Appendix A

United States Court of Appeals
For the Ninth Circuit

Nos. 80-4597, 81-4117

D.C. No. CV 79-814

McClatchy Newspapers, d/b/a
The Sacramento Bee, a California Corporation,
Plaintiff-Appellant,

vs.

Central Valley Typographical Union No. 46,
International Typographical Union,
Defendant-Appellee.

Opinion

[Filed July 14, 1982]

Appeal from the United States District Court
for the Eastern District of California
Raul A. Ramirez, District Judge, Presiding
Argued and Submitted February 9, 1982

Before: WALLACE, KENNEDY, and CANBY, Circuit Judges.

WALLACE, Circuit Judge:

This case presents consolidated appeals brought by McClatchy Newspapers (the publisher). The first appeal is from a judgment of the district court confirming an arbitration award in favor of Central Valley Typographical Union No. 46 (the union), a local of the International Typographical Union. While that appeal was pending, the district court entered an amended judgment which reaf-

firmed the original decision and made additional directives. The second appeal is from the amended judgment. We affirm the original judgment of the district court and vacate the amended judgment.

I

On November 20, 1973, the parties executed an agreement (the Scanner Agreement), a principal feature of which was the guarantee of lifetime jobs to named composing room employees. The guarantee was subject to the following qualifications:

> [Named] composing room employees will be retained in the employment of the Publisher[ ] . . . for the remainder of their working lives unless forced to vacate . . . through retirement, resignation, death, permanent disability, or discharge for cause; provided, however, in the event of permanent suspension of [the] Publisher's composing room operation, such employment guarantee will thereupon cease. In case of a strike or lockout, such employment guarantee shall immediately cease and continuance of this Agreement will be contingent upon the terms of a negotiated strike or lockout settlement . . . .

On April 17, 1978, the Sacramento Mailers Union Local 31 (the mailers), another local of the International Typographical Union, struck the publisher. Some of the composing room employees named in the Scanner Agreement, observing the mailers' picket line, left their work stations prior to quitting time and subsequently refused to cross the picket line. Some also joined the mailers' picketing activities.

The publisher asserted that these activities terminated the job guaranties [sic] of those employees who partici-

pated in the sympathy strike. The union disagreed. The parties submitted the question to arbitration. The stipulated issue submitted to the arbitrator was

> [w]hether the job guarantees provided in paragraph 1 of the 1973 Memorandum Agreement between the Sacramento Bee and Central Valley Typographical Union #46 ceased for any or all of the employees covered by that Agreement by reason of the strike which began April 17, 1978.

On August 10, 1979, the arbitrator issued his decision. He concluded that the word "strike" in the Scanner Agreement referred only to a primary strike and that the sympathy strike did not terminate the job guarantees. Eight months later the publisher requested that the arbitrator reopen the proceedings to receive new evidence. The arbitrator denied the request. The district court confirmed the arbitration award, and the publisher appealed.

Following the district court's decision, the union renewed its demand that the composing room employees be allowed to return to work. According to the union, the district court's order enforcing the arbitrator's decision compelled immediate reinstatement. The publisher disagreed. On February 6, 1981, the union filed a motion for an order adjudicating the publisher's civil contempt. The publisher opposed this motion contending that neither the arbitration award itself nor the district court's confirmation of the award compelled immediate reinstatement. The district court denied the motion, but, pursuant to Fed. R. Civ. P. 62(c), entered an amended order confirming the original award and requiring the publisher to return the composing room employees to their original or equivalent positions.

This appeal presents the following issues: whether the arbitrator acted within the authority conferred upon him by the parties, whether the arbitrator properly refused to reopen the record, whether the district court had jurisdiction to enter an amended judgment while the appeal of its original judgment was pending, and whether the district court properly ordered reinstatement of the composing room employees.

II

Review of an arbitration award is limited. Plenary review of the merits of an arbitration award would undermine the federal policy of settling labor disputes by arbitration. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). Nevertheless, we may determine whether the parties "agree[d] to give the arbitrator the power to make the award he made," *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), and whether the award drew its essence from the agreement submitted for arbitration. *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra*, 363 U.S. at 597. *See Syufy Enterprises v. Northern California State Ass'n of IATSE Locals*, 631 F.2d 124 (9th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981).

The publisher argues that the arbitrator exceeded his powers when he interpreted the term "strike" to encompass only primary strikes. We disagree. The arbitrator's interpretation of the term was essential to his resolution of the issue submitted to him. By empowering the arbitrator to decide whether the job guarantees ceased by reason of the April 17, 1978, strike, the publisher implicitly

agreed to have the arbitrator interpret the scope of the words "strike or lockout" in the Scanner Agreement. The publisher also argues that the award does not draw its essence from the Scanner Agreement. We again disagree. The arbitrator's award "represents a plausible interpretation of the contract." *Riverboat Casino, Inc. v. Local Joint Executive Board,* 578 F.2d 250, 251 (9th Cir. 1978), *quoting Holly Sugar Corp. v. Distillery Union,* 412 F.2d 899, 903 (9th Cir. 1969).

III

The publisher also argues that the award should not be confirmed because the arbitrator improperly refused to reopen the proceedings to consider newly available evidence eight months after the award issued. We conclude that the arbitrator acted properly. "Arbitrators are not and never were intended to be amenable to the 'remand' of a case for 'retrial' in the same way as a trial judge." *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.,* 442 F.2d 1234, 1238 (D.C. Cir. 1971). Even assuming the availability of new evidence, it would not be appropriate for the arbitrator to consider such evidence and then redetermine the issues originally submitted to him.

> It is [a] fundamental common law principle that once an arbitrator has made and published a final award his authority is exhausted and he is functus officio and can do nothing more in regard to the subject matter of the arbitration. The policy which lies behind this is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect

> a new conclusion. The continuity of judicial office and the tradition which surrounds judicial conduct is lacking in the isolated activity of an arbitrator, although even here the vast increase in the arbitration of labor disputes has created the office of the specialized professional arbitrator.

La Vale Plaza, Inc. v. R. S. Noonan, Inc., 378 F.2d 569, 572 (3d Cir. 1967). *See Mercury Oil Refining Co. v. Oil Workers Int'l Union*, 187 F.2d 980, 983 (10th Cir. 1951).[1]

IV

The publisher further argues that the district court was without jurisdiction to enter its amended judgment. We agree. When a judgment is appealed, jurisdiction over the case passes to the appellate court. The filing of a notice of appeal generally divests the district court of jurisdiction over the matters appealed. *Davis v. United States*, 667 F.2d

---

[1]The principle that an arbitration award once rendered is final has been held to contain some limitations. It has been recognized in common law arbitration that an arbitrator can correct a mistake which is apparent on the face of his award, complete an arbitration if the award is not complete, and clarify an ambiguity in the award. *E.g., La Vale Plaza, Inc. v. R. S. Noonan, Inc.*, 378 F.2d 569, 573 (3rd Cir. 1967). Remand to an arbitrator for clarification and interpretation is not unusual in judicial enforcement proceedings. *E.g., Hanford Atomic Metal Trades Council v. General Electric Co.*, 353 F.2d 302, 308 (9th Cir. 1965). Recommitting an issue to an arbitrator for clarification and interpretation does not effectuate an appeal to the arbitrator, a new trial, or an opportunity to relitigate the issue. *Id. See Randall v. Lodge No. 1076, Int'l Ass'n of Machinists and Aerospace Workers*, 648 F.2d 462, 468 (7th Cir. 1981). None of these situations are "within the policy which forbids an arbitrator to redetermine an issue which he has already decided." *La Vale Plaza, Inc. v. R. S. Noonan, Inc., supra*, 378 F.2d at 573. These cases do not apply here because the publisher wishes to introduce new evidence for the specific purpose of convincing the arbitrator that his decision was erroneous.

822, 824 (9th Cir. 1982); *Taylor v. Wood*, 458 F.2d 15, 16 (9th Cir. 1972); *Sumida v. Yumen*, 409 F.2d 654, 656-57 (9th Cir. 1969), *cert. denied*, 405 U.S. 964 (1972). Certain exceptions to the rule have been recognized.[2] Only one of those exceptions, which is codified in Fed. R. Civ. P. 62(c), is arguably applicable in this case. That rule provides in part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. . . .

Rule 62(c) is "merely expressive of a power inherent in the court to preserve the status quo where, in its sound discretion, the court deems the circumstances so justify." J. Moore, 7 Moore's Federal Practice ¶ 62.05, at 62-19 to 20 (2d ed. 1979). It does not restore jurisdiction to the district court to adjudicate anew the merits of the case after either party has invoked its right of appeal and jurisdiction has passed to an appellate court. Rule 62(c) codifies the "long established" and narrowly limited right of a trial court "to make orders appropriate to preserve the *status quo* while the case is pending in [an] appellate court." *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 79 (9th Cir. 1951). "[A]fter appeal a trial court may,

---

[2]For example, a district court may retain jurisdiction under specific statutory authority, *Davis v. United States*, 667 F.2d 822, 824 (9th Cir. 1982); a district court may also act to assist the court of appeals in the exercise of its jurisdiction. *Id.*; *see Securities & Exchange Comm'n v. Investors Security Corp.*, 560 F.2d 561, 568 (3d Cir. 1977).

if the purposes of justice require, preserve the *status quo* until decision by the appellate court. . . . But it may not finally adjudicate substantial rights directly involved in the appeal." *Newton v. Consolidated Gas Co.*, 258 U.S. 165, 177 (1922) (citations omitted) (statement of the rule prior to its codification), *citing Hovey v. McDonald*, 109 U.S. 150, 157 (1883), and *Merrimack River Savings Bank v. Clay Center*, 219 U.S. 527, 534 (1911).

In the present case, the district court's amended judgment was not addressed to maintenance of the status quo during pendency of the appeal; in fact, by ordering the publisher to reinstate employees who were not working when the appeal was filed, the amended judgment required a change from the status quo. Furthermore, the district court's order was not limited to the period of the appeal from the initial judgment. If we were to affirm the district court's amended judgment, the order would affect substantial rights of the parties after appeal. The arbitrator's ruling was limited to a finding that the job guarantees survive the sympathy strike; it was not necessarily a determination that discharge of the employees in all circumstances of this case was wrongful or, that even if it were, the remedy of reinstatement is appropriate. The district court's original judgment, confirming the arbitrator's award, therefore was an adjudication only of the survival of job guarantees. In its amended judgment, however, the district court adjudicated the discharge and reinstatement issues, thus materially affecting substantial rights of the parties not decided in its original disposition of the case. These matters must abide further inquiry, either by arbitration or by appropriate judicial proceed-

ings, in which each party has the opportunity for a full and fair presentation of its case. We therefore conclude that the district court's amended judgment does not fall within the authority of Rule 62(c).

The union argues that the general rule governing jurisdiction is inapplicable because the district court's amended judgment falls within the exception articulated in *Hoffman ex rel. NLRB v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976). There we held that an appeal from a contempt order does not divest the district court of jurisdiction to issue further contempt orders based on subsequent violations of a basic injunctive order, even though later orders may effectively modify the original contempt order. We observed that the general rule that an appeal to the circuit court deprives a district court of jurisdiction should not be applied in those cases where the district court has a continuing duty to maintain the status quo. *Id.* "[W]here the court supervises a continuing course of conduct and where as new facts develop additional supervisory action by the court is required, an appeal from the supervisory order does not divest the district court of jurisdiction to continue its supervision, even though in the course of that supervision the court acts upon or modifies the order from which the appeal is taken." *Id.* *Hoffman* is only an extension of the result achieved by Fed. R. Civ. P. 62(c): just as an appeal from an order granting an injunction does not deprive the district court of jurisdiction to alter the injunction for purposes of maintaining the status quo, an appeal of a contempt order issued to force compliance with an injunction should not divest the court of jurisdiction to modify that order to achieve the

same enforcement purpose. Here the appeal came from the district court's confirmation of the arbitration award, and not from a contempt order (or other supervisory action) that was issued to force compliance with that earlier confirmation. The union is incorrect in arguing that this case falls within the limited exception articulated in *Hoffman*.

We therefore conclude that the amended judgment was rendered without jurisdiction and must be vacated. Our disposition of the amended judgment on jurisdictional grounds obviates any need for review of the merits. We therefore decline to decide whether, had there been jurisdiction, the district court could properly have ordered reinstatement.

AFFIRMED IN PART; VACATED IN PART.

Appendix B

United States Court of Appeals

For the Ninth Circuit

Nos. 80-4597, 81-4117

D.C. No. CV 79-814

McClatchy Newspapers, d/b/a
The Sacramento Bee, a California corporation,
Plaintiff-Appellant,

vs.

Central Valley Typographical Union No. 46,
International Typographical Union,
Defendant-Appellee.

Order

[Filed Sept. 22, 1982]

Before: WALLACE, KENNEDY, and CANBY, Circuit Judges

The opinion filed in the above matter on July 14, 1982, is amended as follows:

Beginning at the bottom of the right-hand column on page 3050, and ending at the top of the left-hand column on page 3051, the words "discharge of the employees in all circumstances of this case was wrongful or, that even if it were," are deleted.

Left-hand column, 8 lines from the top, on page 3051, the words "discharge and" are deleted, and the word "issues" is changed to "issue."

Left-hand column, 11 lines from the top, on page 3051, the words "These matters" are changed to "This matter."

The panel as constituted above has voted to deny the petitions for rehearing and for clarification and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing and for clarification are denied, and the suggestion for rehearing en banc is rejected.

Appendix C

United States District Court

Eastern District of California

Civil No. S-79-814 RAR

McClatchy Newspapers, d/b/a
The Sacramento Bee, a California corporation,
Plaintiff,

vs.

Central Valley Typographical Union No. 46,
International Typographical Union,
Defendant.

Judgment

[Filed Dec. 3, 1980]

This case having come before the Court upon cross motions for summary judgment filed by the respective parties; the Court having considered the motions and documents filed in support thereof; the parties having appeared before the Court by their respective counsel on November 24, 1980, and having presented the motions orally; the Court having concluded that this case is proper for final disposition by determination of the motions for summary judgment; and the Court having issued its order at the close of the hearing on November 24, 1980 that Plaintiff's motion for summary judgment be denied and that Defendant's motion for summary judgment be granted;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That judgment be and hereby is entered against Plaintiff on its Complaint, and that the Complaint be and hereby is dismissed with prejudice;

2. That judgment be and hereby is entered for Defendant on its counterclaim, and that the arbitration award of August 10, 1979, attached to the Complaint as Exhibit "C", be and hereby is confirmed and that Plaintiff and its agents are ordered to comply with said award; and

3. That each party bear its own costs of this action.

Dated:

/s/ Raul A. Ramirez
United States District Judge

Appendix D

In Arbitration Proceedings Pursuant to Section 11 of the Agreement Between the Parties

Sacramento Valley Typographical Union No. 46,
Complainant,

and

McClatchy Newspapers,
The Sacramento Bee,
Respondent.

Job Guarantee-Strike Dispute.

Opinion and Decision

William Eaton, Arbitrator

Appearances:

For the Union:

Duane B. Beeson, Esq.
Beeson, Tayer & Kovach
100 Bush St., Suite 1500
San Francisco, Calif. 94104

For the Publisher:

Allen Teagle, Esq.
Richard N. Hill, Esq.
Littler, Mendelson, Fastiff & Tichy
650 California St., 20th Floor
San Francisco, Calif. 94108

Douglas T. Foster, Counsel for
McClatchy Newspapers
P.O. Box 15779
Sacramento, Calif. 95813

STATEMENT OF THE CASE

This is an arbitration to determine the following issue as stipulated to by the parties:

> Whether the job guarantees provided in paragraph 1 of the 1973 Memorandum of Agreement between the Sacramento Bee and Central Valley Typographical Union No. 46 ceased for any or all of the employees covered by that Agreement by reason of the strike which began April 17 1978.

Hearing was held in Sacramento on April 4 1979, at which time the parties waived the provisions of the Agreement providing for a board of arbitration, and agreed to submit the issue to the single undersigned Arbitrator for final and binding decision. Submission was completed upon filing of post-hearing briefs, the last of which was received by the Arbitrator on July 20 1979.

The strike which began on April 17 1978 was called by the Mailers Union Local No. 31, which is an independent local union, but, like the typographical union, shares a common affiliation with the international typographical union. The cause of the strike, which was authorized by the international union, was failure to agree on a new collective bargaining agreement. Local No. 46 had reached agreement with the publisher on April 13 1978, the Agreement being effective January 1 1977, although it was not formally signed until June 6 1978.

After the commencement of the mailers' strike, a group of some seven or eight typographical union members remained at work; approximately 30 typographical union members who initially honored the picket line of the mailers subsequently returned to work; the majority of the members of Local 46, approximately 80 including union

officials and members of the scale committee, continued to honor the picket line of the mailers.

In general, it is the position of the employer that the job guarantees provided in the 1973 Memorandum of Agreement, commonly referred to as the Scanner Agreement, ceased for all members of Local 46 for the reason that the local engaged in a strike contrary to the terms of the Scanner Agreement. It is the union's position that honoring the picket line of the mailers union does not constitute engaging in a strike contrary to the Scanner Agreement provisions, and that union members are further protected by the provisions of Section 27(b) of the current collective bargaining Agreement between the typographical union and the Sacramento Bee.

Strike Background

In the spring of 1978 contract negotiations were underway between the Sacramento Bee and three unions, the mailers, the guild, and the typographical union. In general, representatives of each of the other two unions were present when negotiations were being conducted with the newspaper and any one of the three unions. Ray Brown, an international representative of the ITU, was present and negotiated on behalf of both the mailers and the typographical union during these negotiations. A few days after the agreement was reached between the typographical union and the newspaper, agreement was also reached between the guild and the newspaper.

Prior to these agreements being reached there was considerable apprehension that one, or all, of the unions might strike the newspaper. Accordingly, the typographical union met and took a strike vote prior to ultimate set-

tlement, which vote was affirmative for a strike. The union also established a strike committee which, according to union president Joe O'Brien, was appointed on April 9, but never functioned due to the fact that agreement was reached.

Initially the guild, as well as the typographical union, honored the picket line of the mailers. However, after approximately one week members of the guild voted overwhelmingly to return to work, and did so. While members of the typographical union have received "strike benefits" from the international union since the inception of the mailer strike, it appears to be the policy of the international union to provide such benefits to locals observing the picket line of another union as well as to locals engaged in a primary strike.

Union Response

Union president O'Brien testified that he learned definitely on April 16 that there would be a strike of the mailers commencing at 4:00 p.m. on April 17, and that he was therefore at the composing room of the Sacramento Bee at that time. He testified that after the mailers came out and began picketing, most of the printers "filtered out" shortly thereafter. O'Brien went in to speak to the remaining printers. What was said by him, and by another union representative, Manny Gonzales, who attended him, is a matter of controversy.

O'Brien testified that two printers remained in the plant, and that he informed them that there was a picket line outside, and that Local 46 was honoring that line. He did not, according to his testimony, order anyone out or threaten disciplinary action. He did agree, however, that Gonzales

had probably made reference to possible discipline under the ITU laws in response to a question put to him by one of the remaining employees. O'Brien agreed that there had been no picket line when the printers on duty at 4:00 p.m. had come to work, and that they had left before the end of their shift in response to the establishment of the mailers' picket line.

Fred O'Connor, who was one of the printers who stayed at work on April 17 and thereafter, testified that O'Brien spoke to him, and told him that it was his "last chance" to go "out on strike" with the rest of the members. He stated that Gonzales informed him that he would "suffer consequences" of the ITU general laws if he refused. According to O'Connor, assistant chapel chairman Ed Bonilla had told him essentially the same thing earlier in the day, while informing him that Local 46 was going "to go on strike" later that day.

Pre-press department manager Gene Harris testified that he accompanied O'Brien into the composing room when he talked to O'Connor and the other employee, and that he heard what was said. According to Harris, O'Brien informed these employees that they were "expected" to go outside, and that he was giving them a "last warning" to "get out there now." Harris testified that it was not the policy of the newspaper to clear the composing room in the circumstances, that he did not order any printer out, and that to the best of his knowledge no other supervisor did either.

It is agreed that members of the typographical union have appeared on the picket line of the mailers carrying signs in support of their strike. According to O'Brien, the

signs carried by typographical union members have indicated only that the typographical union is honoring the picket line, while those carried by mailers indicate that their union is "on strike." O'Brien testified that he has informed typographical union members never to carry the mailers' signs. Employer witness Harris testified, on the contrary, that he has seen typographical union members carrying the "on strike" signs on "numerous occasions."

Among materials which have appeared in support of the strike there was introduced into evidence copies of a publication called "The Worker Bee", which bills itself as "Sacramento's Only Afternoon Daily." The issue of July 19 1978 carried, among other items, an exortation by union president Joe O'Brien to the printers who remained at work to cease work and join the other union members in observance of the mailers' strike.

After the commencement of the strike an investigating committee was established by the typographical union under the chairmanship of Manuel Gonzales. In his capacity as chairman of the investigating committee, Gonzales sent Mailgrams to the employees who remained at work, dated April 19 1978, notifying them that the president and secretary of Local 46 had filed charges of "Ratting" against them, and that to avoid expulsion from the union they should contact Gonzales. On August 9 1978 all of the employees who had received the Mailgram also received a letter rescinding the Mailgram for the reason, as testified to by O'Brien, that the union had discovered that the ITU laws did not allow such action. O'Brien stated that all seven of the employees who remained at work, including O'Connor, who testified at the arbitration hearing, have offered resignations to the union.

In support of its position herein, the publisher offered into evidence what would appear to be a news release, and which its testimony indicates appeared in the news room of the Sacramento Bee on April 17 1978, the date of the release. The release is attributed to George Randol, administrative officer of the guild, and contains the statement that officials of the printers union had "directed their members" to honor the picket line of the mailers. Also introduced was an unemployment benefit application prepared by typographical union chapel chairman Don Palaia, indicating that his reason for being unemployed was "strike", which indication was made by checking a box opposite that word on the form.

On May 12 1978, in a communication from Keith Fuller, the employer's director of employee relations, the employer notified the union that in its opinion the guarantees referred to in the Scanner Agreement had ceased as a result of the activities indicated above. The joint standing committee ultimately took up the problem, which was deadlocked, leading to this arbitration.

Relevant Provisions of the Agreements

Memorandum of Agreement
between
Sacramento Newspaper Publishers Association
and
Central Valley Typographical Union #46

1. The Sacramento Newspaper Publishers Association, hereinafter referred to as the 'Publishers' agree that all of its composing room employees whose names appear on the attached lists will be retained in the employment of the Publishers in accordance with accepted rules governing

situation holders for the remainder of their working lives unless forced to vacate same through retirement, resignation, death, permanent disability, or discharge for cause; provided, however, in the event of permanent suspension of either Publisher's composing room operation, such employment guarantee will thereupon cease. In case of a strike or lockout, such employment guarantee shall immediately cease and continuance of this Agreement will be contingent upon the terms of a negotiated strike or lockout settlement; and provided further in the event of an 'Act of God' which results in a period of suspension of either Publisher's composing room operation, the job guarantee will be suspended for such period only.

Newspaper Agreement
and
Scale of Prices
Locked Out and Struck Work

Section 27. (*a*) . . .

(*b*) The Union reserves the right to direct its members to refuse to cross a picket line established by Sacramento Mailers Union #31 of the International Typographical Union against the Publisher, signatory hereto, which picket line has been established as a result of a strike authorized under the laws of the International Typographical Union. In the event such action is exercised there shall be no payment for work not performed.

1973 Scanner Agreement Negotiations

In the 1973 negotiations which led to the Scanner Agreement, the union had originally proposed in the introductory paragraph that, in the case of a strike or lockout, the job

guarantees elsewhere provided in the Agreement would be suspended "for such period of temporary suspension of operation only." This language was rejected by the publisher, and the language which appears in the Scanner Agreement, as set forth above, was adopted instead. Though there is some confusion in the testimony, it appears that then international vice president of the typographical union, Joe Bingle, who is now international president, made a statement to the effect that, in light of the language adopted, if the union were to go out on strike it would take the security of the job guarantee clause with it. However, it appears that there was no discussion as to what the result would be should the union honor the picket line of another union during the 1973 negotiations.

A similar scanner agreement had been reached between the Fresno Typographical Union and the Fresno Bee in 1973. On November 21 1978 there was added to the Fresno agreement a document referred to as Supplemental Agreement I. Paragraph I of the Supplemental Agreement reads as follows:

> The attached Scanner Agreement will continue and will be administered as in the past but it will never be a negotiable item for either party in the future negotiations. This is to mean that it will stand by itself regardless of the status of the main collective bargaining agreement. It is further understood that consistent with the negotiators' original intent and in accordance with the written Scanner Agreement, if any individual or group of individuals who have a job guarantee strike or honor a picket line of another union, their job guarantee will cease. The continuance of such job guarantee will be contingent upon the terms of a negotiated strike or lockout settlement.

Industrial relations manager for McClatchy Publications, Jack Lane, testified that this supplemental agreement arose out of the present dispute, and was reached in order to prevent a similar dispute arising in Fresno.

Negotiations for Current Agreement

In the prior agreements between the parties there was no provision similar to that now contained in Section 27(b). The union had originally proposed an individual right to honor the picket line of any union, a proposal which the company rejected. The issue remained unresolved until final agreement was reached on April 13 1978.

Employer testimony is that the language finally adopted is taken from the Fresno Bee contract, which was described as necessary by union international representative Brown in order that the international and local unions would be held harmless should either direct the honoring of a Mailers Union picket line. It would appear that nothing was said during the final negotiating sessions leading to the adoption of Section 27(b) concerning any relationship between that section and the job guarantees in the Scanner Agreement.

Prior to the final negotiating sessions employer representatives had told union representatives that the guarantees of the Scanner Agreement would be lost if the union honored another union's picket line. The union made no response. It is agreed, however, that the parties were operating under an expired agreement at that time, which had not yet incorporated the provisions of 27(b), and that the union proposal concerning 27(b) was still pending. Local union president O'Brien testified that it was for these and other reasons that no union response was made to company

assertions concerning loss of the guarantee during negotiations.

DISCUSSION

Company Argument

The Arbitrator should find that the publisher conditioned the job guarantee provided in the Scanner Agreement on availability for work from the very start of the 1973 scanner negotiations. Not only did international vice president Bingle conceded [sic] that in the event people struck they would "take their job security with them", local president O'Brien eventually agreed in his testimony that company admonitions to the union during the 1977 and 1978 negotiations that a sympathy strike would result in loss of the guarantees were true. The Arbitrator should also conclude that Brown proposed and agreed to the language of Section 27(b) in order to prevent the local and international unions from being held financially liable for directing a sympathy strike.

In honoring the Mailers' picket line the union engaged in what is commonly referred to as a "sympathy strike." This was a "strike" within the meaning of the 1973 Scanner Agreement. In the plain language of that agreement no distinction is made between a sympathy strike and any other kind of strike, nor is any exclusion made for sympathy strikes.

At least one arbitrator has held that a general reference to "strikes" in a contract establishes a prima facie case that sympathy strikes are included. *Westinghouse Transport Leasing Corporation*, 77-2 ARB ¶ 8583, 69 LA 1210 (1977). In the present dispute the union has failed to rebut the prima facie case that a sympathy strike is a strike

within the meaning of the plain language of the Scanner Agreement.

At no time during the 1973 scanner negotiations did the union in any manner suggest that the language adopted should be interpreted to exclude sympathy strikes. Union negotiators thereby acquiesced to the plain and literal meaning of the language adopted. When the publisher first proposed the concept of a job guarantee its negotiator, Keith Fuller, stated in no uncertain terms that any job guarantee would be expressly contingent upon the union members making themselves available for work. The publisher's position that a sympathy strike is a "strike" within the meaning of the Scanner Agreement is consistent with union vice president Bingle's assurance that in the event the members walked out they would take their job security with them. Perhaps the most compelling evidence of the parties' intent in this regard is O'Brien's admission that the Scanner Agreement includes sympathy strikes.

The union acknowledged during the course of the 1976-78 negotiations for a new Newspaper Agreement that the term "strike" as used in the Scanner Agreement includes sympathy strikes by demanding a picket line clause which would have specifically granted to employees the right to engage in sympathy strikes. In its April 6 1978 letter, distributed to all employees and to Local 46 officials, the employer referred to the relevant language of the Scanner Agreement providing for the immediate cessation of the job guarantee in the event of a strike. This was in response to a hypothetical question regarding the effect of "not coming to work."

Thus the parties' statements and conduct subsequent to the execution of the Scanner Agreement reconfirm their

clear intent that the typographical job guarantee would cease when there is a sympathy strike.

This intent is further established by reference to the Fresno Scanner Agreement and the Supplement thereto. The original Fresno Agreement was signed back-to-back with the Sacramento Agreement, in very brief negotiations duplicating exactly what had been agreed upon in Sacramento.

The original intent of the parties in negotiating the Fresno Scanner Agreement was to provide for cessation of the typographical job guarantee in the event that individuals honor a picket line of another union, as restated in the Supplemental Agreement between the parties in November of 1978.

Those National Labor Relations Board decisions holding that a no strike clause does not waive the Section 7 right of a union or its members to engage in sympathy strikes unless the waiver is expressed in "clear and unmistakable" language do not apply to this arbitration, and any reliance by the union on those decisions is misplaced. The job guarantee at issue in this dispute has no statutory basis, the case does not involve any employer action to discharge or discipline any employee, the case does not involve any alleged violation of a no strike clause, and, finally, the Scanner Agreement Preamble involved herein is totally unrelated to the grievance-arbitration provisions of the Newspaper Agreement.

The evidence in this dispute makes it unmistakably clear that the sympathy strike was directed by the union, and was in no manner a spontaneous reaction of the employees involved. The union immediately announced that it was determined to discipline those members who refused to

strike in sympathy with the Mailers, and formed an investigating committee. The charges of "ratting" filed by that committee had their effect. The August 19 revocation of the earlier Mailgram was too little and too late. The union had reaped the maximum coercive effect of the instant disciplines which it had so quickly imposed.

There is ample evidence that the strike was supported by the international union through payment of strike benefits. Under the ITU Book of Laws strike benefits are payable only in the event of a strike by or a lockout against an ITU local.

There is further evidence that members of Local 46 perceived themselves to be "on strike", as shown in unemployment insurance benefit applications and in the close cooperation between the Typographical and the Mailers Unions.

Any further argument by the union that it and its members did not engage in a "strike" is foreclosed by the present Arbitrator's January 25 1979 decision in an arbitration between this publisher and the Central California Newspaper Guild. That decision upheld the publisher's right to hire permanent replacements for various guild members who honored the Mailers' picket line beginning April 17.

The picket line clause contained in Section 27(b) of the Newspaper Agreement does not protect the job guarantees of the Scanner Agreement. This language was taken from the Fresno Bee and ITU Agreement, as contained in that Agreement long before the 1973 Fresno Scanner Agreement. The best evidence of the proper interpretation of Section 27(b) is the meaning attached to the Fresno picket

line clause by the parties thereto. The 1978 Fresno Supplemental Agreement clearly and unambiguously demonstrates that the Fresno picket line language which existed at the time the Fresno Scanner Agreement was agreed upon was never intended to prevent the cessation of the Fresno ITU typographical guarantee in the event of a sympathy strike.

All Section 27(b) does is hold the local and international unions "harmless" in the event that they direct members to honor their sister unions' picket line. Any contention now that that section protects the job guarantees goes far beyond the union's expressed objective in seeking the language. Such an intent was never discussed during negotiations between the parties, nor has the publisher ever agreed to the union's unachieved original picket line demand which would have granted employees the right to honor the picket line of another union.

In any event, the union's reliance on Section 27(b) is foreclosed by Section 64 of the Newspaper Agreement, which specifically provides that the Scanner Agreement and the provisions thereof "shall continue to control the suspension, vacation, cessation or continuance of any job guarantees thereunder."

For these reasons it is respectfully submitted that the Arbitrator should find that the typographical job guarantee contained in the Scanner Agreement immediately ceased as a result of the sympathy strike which began on April 17 1978. Alternatively, at the very least, the Arbitrator should find that said job guarantee immediately ceased for all job guarantee holders who actively participated in the strike.

Union Argument

The words of the 1973 Scanner Agreement upon which the employer attempts to rely simply do not bear the interpretation which it attempts to force upon them. It is clear that the reference to "a strike" is to strike action by the employees covered by the guarantee. The question is whether the composing room employees have themselves engaged in "a strike" within the meaning of the Agreement.

To sustain its interpretation, the company must argue that a strike is synonomous with honoring the picket line of another union. By definition, however, the difference is plain.

The clause itself contemplates that where job forfeiture occurs because of a strike, continuance of the job guarantee will be contingent upon "the terms of a negotiated strike . . . settlement." In the present case the union is not on strike, and is not in a position to negotiate a strike settlement. Were the Mailers to withdraw their picket line, composing room employees would be required to return to work at once under the terms of their existing collective bargaining Agreement.

The distinction between a strike and honoring a picket line is well-established in labor law generally. The courts and the National Labor Relations Board have rejected the argument, except in cases where the contract language was clearly intended to prohibit the refusal of non-striking employees to cross picket lines, that a no-strike clause prohibits non-striking employees from honoring the picket line of a striking union.

A lifetime job guarantee is of extraordinary value to an employee, particularly in an industry of declining employment. If the parties had meant that this benefit was to be lost by honoring the lawful picket line of another union, the employees have a legitimate expectation in being so notified by appropriate contract language. In the scanner negotiations of 1973 the subject was not addressed. All that was said was "strike", and that was all that was meant.

Section 27(b) of the current Agreement makes it clear that there can be no forfeiture of job guarantees in this case. This section for the first time affords contract protection for union members who refuse to cross a picket line. The provision, negotiated just prior to the Mailers' strike, was tailor made to apply to the strike and picket action which occurred four days after its adoption.

Read in conjunction with the 1973 Scanner Agreement, Section 27(b) means that employees with job guarantees will lose their guarantee if they strike, but that they may be directed by the union not to cross the Mailers' picket line. Employees cannot reasonably be invited by contract to take action which destroys their job security, at least without being told in express and unambiguous language that such a consequence will befall them. Not only is there nothing in the contract which provides fair warning, it is conceded that there was nothing in the discussion which led to the adoption of Section 27(b) which bore upon the subject.

Even if doubts regarding the local union's attempt to discipline employees are resolved in favor of the company's position, the union's conduct in support of the strike cannot be converted into strike action within the meaning of the

1973 Scanner Agreement. Nor does receiving out of work benefits or participating in the picketing with signs indicating that the Typographical Union is honoring the Mailers' Union strike make strikers out of composing room employees, anymore than similar activity on the part of students, members of other unions, or supporters from the community would make those groups into strikers when they assist the Mailers.

There is a plain difference between a striker and a non-striker who is supporting a strike, and that difference cannot be blurred by the quantity or quality of the support given.

The negotiating history of the 1973 and the current Agreements does not support the company's position. While international vice president Bingle agreed that in the event the people struck they would lose their job security, nothing was said about a refusal of composing room employees to honor the picket line of another union. Similarly, on April 13 1978, when Section 27(b) was adopted, again nothing was said with respect to its impact upon the 1973 job guarantee provision.

Nor is it material that the language of Section 27(b) was drawn from the Fresno Agreement. The union in the present dispute persuaded the company to accept the picket line language because of the anticipated Mailers' strike in Sacramento.

The most direct testimony of discussions on the present issue consists of statements by company representatives in October of 1977 and February of 1978 to the effect that if composing room employees were to honor a picket line of another union, they would lose their guaranteed jobs, to

which the union did not respond on either occasion. There are several observations to be kept in mind in evaluating this testimony.

First, it has no value in determining the meaning of the 1973 Memorandum of Agreement. Second, the statements preceded the adoption of Section 27 of the current Agreement, and therefore do not reflect the intent of the parties in adopting that clause. If any inference were to be drawn, it would be that the company would have had to reiterate its position in the final negotiating session had it not intended to yield on the point. After all, Section 27(b) gives contractual protection to employees who honor picket lines, and on its face such protection would appear inconsistent with the position that loss of a guaranteed job would occur by honoring the Mailers' line.

Finally, the union's representatives declined to respond for a very interesting reason. They were uncertain as to whether a refusal to cross a picket line in the absence of contractual protection, which the union did not have in the prior agreement, might be regarded as cause for discharge under that contract, thus defeating the job guarantee because of "discharge for cause." Moreover, the union at that time was concerned about the possibility of its own strike. Hence, it was decided not to argue with the company.

For all of the foregoing reasons, it is respectfully submitted that decision in this case should be in favor of the union's position.

Conclusions

The crucial language in this dispute is contained in the 1973 Scanner Agreement. That language provides that, in case of a "strike" the employment guarantee will cease, and

the continuance of the Scanner Agreement will be contingent upon the terms of a "negotiated strike . . . settlement." The combined reference to a "strike" and a "negotiated" settlement clearly implies a primary strike in which the terms of a collective bargaining agreement are in dispute. If something more is meant, the employer in this dispute bears the burden of proof.

There remains little doubt that the union directed its members in the most forceful terms to observe the Mailers' picket line. Nor is there any reason to disagree with the employer's argument that, by the time the original Mailgrams threatening disciplinary action were rescinded the full effect of the union's support had been achieved. This conclusion, however, sheds little light on the contractual issue to be determined.

It would also seem fairly clear that Section 27(b) is not applicable to this dispute. There is nothing on the face of that provision which indicates any intent to relate it to the job guarantee of the Scanner Agreement, nor is there any evidence that such a connection was ever discussed during negotiations which led to the adoption of Section 27(b). Whatever guarantees are provided by 27(b), we must conclude, run to matters other than the present issue.

Nor are the analogies suggested from NLRB decisions, or from the precedents offered by the publisher in its brief, particularly helpful. We are not concerned with any statutory right, with an allegation that a no-strike clause has been violated, or with discharge for cause related to strike activities of any sort. If these cases offer any assistance, it would be limited to the very broad recognition that distinctions are often made between a primary strike and refusal to cross the picket line of another union, whether

that be termed a sympathy strike or honoring the picket line.

The *Westinghouse* case, upon which the publisher places considerable reliance, involves too many elements not present in the instant dispute to be particularly helpful. For example, it involves a no-strike pledge and an obligation to resort to all reasonable means under the agreement to resolve the controversy before resort to "strike, lockout, tieup, or legal proceedings." For these and similar reasons the arbitrator's conclusion that "a sympathy strike is a strike" must be taken in context of that dispute and does not necessarily represent a generally accepted rule.

Nor does the Guild decision of the present Arbitrator, cited by the publisher, furnish guidance in this dispute. There was nothing in that dispute remotely resembling the job guarantee clause of the Scanner Agreement upon which the present dispute turns. Hence, that opinion does not contain any discussion which would bear upon the central issue in this dispute.

Reference to similar language in the Fresno Agreement, while interesting, is not, upon close examination, dispositive of this dispute. While the Supplemental Agreement of November 21 1978 purports to affirm the "original intent" of the 1973 agreement, that affirmation was expressed in circumstances quite dissimilar to any existing in Sacramento. In particular, it was part of an agreement that the Fresno Scanner Agreement would never be a negotiable item for either party in the future. Moreover, it was undisputed that the particular language of the Supplemental Agreement in Fresno specifically providing that honoring the picket line of another union would lead to loss of the

job guarantee was adopted as a result of the present dispute, and to assure that no such dispute could arise in Fresno. Thus it would seem wise to resist the temptation to recognize any nascent doctrine of retroactive original intent which might lurk in the arguments presented.

The publisher's letter to all employees, dated April 6 1978, upon which the publisher relies in part, does little to advance its argument. In response to a hypothetical question regarding the effect on the lifetime guarantee of an ITU employee if he does not come to work, the company merely quotes the contract language at issue.

The publisher's admonitions during negotiations for the present Agreement, on the contrary, must be examined most carefully particularly the allegation in relation to those admonitions that local union president O'Brien agreed with them. There is no dispute but that the employer representatives on the negotiating team stated at least twice that honoring the picket line of another union would cause loss of the job guarantees. Nor is it disputed that union representatives remained silent in the face of these statements.

At the time these statements were made the parties were operating under an expired agreement, and were negotiating terms which later resulted in Section 27(b), a new provision in the Agreement. Moreover, it was not clear during these negotiations whether any, or all, of the unions involved might ultimately strike over terms of the new Agreement. Union testimony is that, amidst these and possibly other uncertainties, it was decided simply not to argue with the company. Hence, union negotiators remained silent.

It was regarding such circumstances as these that O'Brien stated that "as matters stood at that particular time" he probably agreed with the comment of the company negotiators. In all of these circumstances, and in particular in the absence of a valid collective bargaining agreement, O'Brien's comments in this regard simply do not amount to agreement with the company's stated position. Nor, in the same circumstances, can the company's unilateral statement of position be considered a binding interpretation of the Agreement.

Returning to the language of the Scanner Agreement of 1973, reference is clearly made to a primary strike situation, whereas reference is not clearly made to the honoring of the picket line of another union. Similarly, the references made during negotations [sic] of the 1973 agreement by the parties, and particularly by vice president Bingle, also clearly related to a primary strike, but did not clearly relate to the honoring of a picket line of another union.

The value of an agreed upon lifetime guarantee of work is readily apparent. Where such a benefit is to be deleted or withdrawn such action must have clear contractual sanction. The employer in this dispute has been unable to demonstrate that such sanction was intended by the parties or that it presently exists.

DECISION

For the reasons set forth in the foregoing Opinion the job guarantees provided in Paragraph 1 of the 1973 Memorandum of Agreement between the Sacramento Bee and the Central Valley Typographical Union No. 46 did not cease for any of the employees covered by that Agreement by reason of the strike which began April 17 1978.

/s/ Wm. Eaton
William Eaton, Arbitrator

August 10 1979

Appendix E

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.